PEKELILING TRIANGLE SDN BHD & ANOR

v.

CHASE PERDANA BHD

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
MOHD SAARI YUSOFF JCA
MOHD NOOR AHMAD JCA
[CIVIL APPEAL NO: W-02-507-2001]
9 AUGUST 2002

CIVIL PROCEDURE: *Injunction - Order of injunction - Balance of convenience - Damages - Whether appropriately considered by trial judge - Whether appellate court should intervene*

ARBITRATION: *Stay of proceedings - Entry of conditional appearance - Whether a step in proceedings - Arbitration Act 1952, s. 6*

ARBITRATION: *Stay of proceedings - Stay of plaintiff's action against defendants - Whether parties contracted to arbitrate dispute - Whether dispute technical in nature - Whether plaintiff exhibited strong grounds for refusing stay*

CIVIL PROCEDURE: *Action - Claim for work done - Whether dispute should be settled by way of arbitration and not court proceedings - Whether parties contracted to arbitrate dispute - Whether dispute technical in nature*

The plaintiff was employed to construct a building by the first defendant pursuant to a contract made between the parties. The contract was a lump sum contract in the value of RM110 million and it contained an arbitration clause. Payment was guaranteed by an irrevocable bank guarantee and it would only be made upon the issuance of the certificate of practical completion ('CPC') by the second defendant, the architect of the building. The second defendant, however, did not issue the CPC on the basis of major shortcomings in the building project. The third defendant under the purported authority of the first defendant entered the project site apparently to clear the plaintiff but soon vacated the site when served with an *ex parte* injunction order issued by the High Court. The plaintiff filed an action claiming payment for work done and applied for injunctions, *inter alia*, restraining the defendants from entering the project site and from terminating the contract. Whilst the defendants applied for stay of the plaintiff's action pending reference to arbitration. The High Court dismissed the defendants' application for stay and allowed the plaintiff's application for injunctions. Hence, the defendants' appeal.

The issue was whether the learned judge was right in refusing the stay and granting the injunctions.

Held:
Per Mohd Noor Ahmad JCA

[1] As held by the learned judge the totality of the facts presented had disclosed a *bona fide* serious issue to be tried. However the plaintiff would not suffer an irreparable injury with the grant of the injunctions. The plaintiff could be adequately compensated with damages by means of the bank guarantee even if the defendants were not in a financial position to pay the plaintiff. Being an irrevocable bank guarantee, the bank could not escape liability to pay the plaintiff unless the termination of the contract by the defendant was lawful. As the plaintiff would be adequately compensated by damages if it succeeded at the trial, the application for injunctions should have been refused. (pp 163 d-h & 164 a)

[2] The learned judge considered the relevant matters under the balance of convenience factor all together and not step by step as he should have done. As the first step was not crossed, the other matters relating to the balance of convenience need not be considered by the court. (p 164 a & f)

[3] The learned judge in arriving at his decision relied on three factors, namely, (i) the plaintiff had constructed the building; (ii) the second defendant had certified the sum of RM102,428,245.83 for works done; and (iii) the glowing write-up of the building in the local newspaper. The certification for works done was solely for the purpose of the plaintiff's monthly draw down from its financial institution for work done on site. Also no payment could be demanded from the first defendant based on the interim statements for work done. Therefore, such reliance was misplaced. Further, the glowing write-up of the building in the local newspaper was mere publicity in the interest of business efficacy and it followed that such reliance was also wrong. (pp 165 h & 166 a-c)

[4] The grant of the injunctions by the learned judge was unjust. Firstly, by the injunctions the first defendant was compelled to continue to employ the plaintiff which could not deliver the building on time and also not in accordance with the approved drawings and specifications. Secondly, the plaintiff was allowed to remain in possession of the site and that might aggravate the existing stalemate with no benefit but losses

to both sides. Also, such situation would not be conducive to the economy of the country. Thirdly, the first defendant was virtually forced to swallow the patent defects even though some of them were contrary to the approved drawings and specifications. Lastly, the first defendant was compelled to accept STM, the same consultant earlier employed by the plaintiff to do the Contract Completion Status Review Report. The independence of the party appointed by the court was also sacrificed. (p 166 d-g)

[5] In *Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Bhd & Anor Appeal* the court held that the entry of an unconditional appearance constituted the taking of a step in the proceedings. Hence, in the present case, since the defendants had entered a conditional appearance and merely applied for stay, that did not amount to the taking of a step in the proceedings within s. 6 of the Arbitration Act 1952. (pp 168 h & 169 a)

[6] The onus is on the plaintiff to satisfy the court that it is proper to refuse the application for stay and the plaintiff must exhibit strong grounds for refusing stay. Even if the defendants satisfied the conditions for the grant of stay under s. 6 of the Arbitration Act 1952, it did not *ipso facto* follow that they would be entitled as of right to a stay, for the court still retained discretion to refuse it. But generally, the approach of the court will be that parties who make a contract to arbitrate their disputes should be held to their bargain. (p 167 g-h)

[7] The arbitration process would be more expeditious since the sole issue that would be before the arbitrator was whether the CPC should be issued based on the completion status. On the contrary, as court proceedings including interlocutory applications and the process of appeals are usually protracted, the completion of the construction of the building would be prolonged. The fact that the learned judge had given an early date for trial did not make much of a difference. There was no good reason as to why the plaintiff declined to honour its bargain under the contract to settle the dispute by arbitration when the reports of the assessment of the completion status prepared by STM were in its favour. (p 169 b-c)

[7a] The question of the issuance of the CPC was technical in nature. An independent arbitrator with vast knowledge and experience in the building construction would be more ideal for the purpose. It would be unjust if the defendants were prevented from going to arbitration and forced to have their rights determined by litigation to which they had

not agreed to, a jurisdiction which would probably be more limited than that of an arbitrator. Further, there is no inherent objection to an action and arbitration proceeding side by side. Once the question on whether the CPC should be issued is decided by the arbitrator, the urgency in the court action will be reduced. As the learned judge had manifestly proceeded on wrong grounds in refusing stay, it followed that the plaintiff could not have exhibited strong grounds for refusing stay. (pp 169 d-h & 170 a-c)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif diambil kerja oleh defenden pertama untuk satu projek pembinaan pembangunan berdasarkan satu kontrak di antara kedua pihak tersebut. Kontrak tersebut bernilai RM110 juta dan mengandungi satu fasal timbangtara. Pembayaran dijamin oleh jaminan bank dan hanya akan dibuat apabila satu sijil penyelesaian praktikal ('CPC') dikeluarkan oleh defenden kedua iaitu akitek bangunan tersebut. Namun, defendan kedua tidak mengeluarkan CPC tersebut atas alasan bahawa terdapat beberapa kekurangan dalam projek tersebut. Defendan ketiga atas arahan defenden pertama memasukki tapak projek tersebut agaknya untuk menghalau plaintif daripada tempat itu tetapi dengan cepat berundur apabila disampaikan dengan perintah injunksi *ex parte* Mahkamah Tinggi. Plaintif memfailkan satu tindakan untuk pembayaran bagi kerja yang selesai dan juga memohon untuk injunksi, *inter alia*, bagi menahan defendan-defendan daripada memasukki tapak projek dan daripada menamatkan kontrak. Sementara defendan-defendan memohon untuk penggantungan tindakan plaintif sambil rujukan untuk timbangtara. Mahkamah Tinggi menolak permohonan defendan-defendan untuk penggantungan tetapi membenarkan permohonan plaintif untuk injunksi-injunksi. Maka rayuan defenden-defenden ini.

Isunya adalah sama ada hakim yang arif betul apabila beliau menolak pengantungan dan membenarkan injunksi-injunksi tersebut.

Diputuskan:
Oleh Mohd Noor Ahmad HMR

[1] Seperti yang diputuskan oleh hakim yang arif, keseluruhan fakta kes menunjukkan satu *bona fide* isu yang serius untuk dibicarakan. Tetapi dengan injunksi-injunksi tersebut, plaintif tidak akan mengalami apa-apa kerugian yang tidak boleh diperbaiki. Plaintif boleh diberikan gantirugi secukupnya dengan adanya jaminan bank tersebut meskipun defendan tidak mampu membayar plaintif. Oleh sebab jaminan bank itu tak boleh

batal, bank terpaksa membayar plaintif kecuali jika pembatalan kontrak oleh defenden adalah sah. Oleh kerana plaintif boleh dibayar gantirugi secukupnya kalau ia menang dalam perbicaraan, permohonan untuk injunksi-injunksi tersebut patut ditolak.

[2] Hakim yang arif mempertimbangkan perkara-perkara yang relevan di bawah faktor 'balance of convenience' serentak dan bukan mengikut langkah-langkah yang harus diatasi satu persatu. Oleh kerana langkah pertama tidak diatasi, perkara-perkara lain di bawah faktor tersebut tidak perlu di ambil kira oleh mahkamah.

[3] Hakim yang arif bergantung kepada tiga faktor bagi keputusannya iaitu bahawa: (i) plaintif membina bangunan tersebut; (ii) defenden kedua mengesahkan jumlah wang RM102,428,245.83 bagi kerja-kerja selesai oleh plaintif; dan (iii) artikel dalam akhbar tempatan memuji pembinaan bangunan tersebut. Pengesahan jumlah wang tersebut hanya untuk plaintif mengeluarkan wang daripada institusi kewangannya bagi kerja yang selesai di atas tapak pembinaan. Lagi, tiada pembayaran boleh diminta daripada defendan pertama atas pernyataan interim bagi kerja yang selesai. Dengan itu, penggantungan ke atas faktor tersebut tidak betul. Lagi, artikel dalam akhbar tempatan tersebut tidak lebih dari publisiti demi kepentingan kecekapan perniagaan dan dengan itu penggantungan terhadap faktor tersebut juga salah.

[4] Permohonan untuk injunksi-injunksi yang dibenarkan oleh hakim yang arif adalah tidak adil. Pertamanya, dengan injunksi-injunksi itu defenden pertama terpaksa terus mengambil kerja plaintif yang tidak boleh menyampaikan bangunan tersebut dalam masa yang ditetapkan dan juga tidak mengikut lukisan dan spesifikasi yang diluluskan. Keduanya, plaintif dibenarkan berada di dalam tapak pembinaan tersebut dan ini akan memburukkan lagi keadaan dengan tidak membawa apa-apa keuntungan tetapi kerugian kepada kedua pihak. Lagi keadaan macam itu tidak akan menghasilkan ekonomi negeri. Ketiganya, defenden pertama terpaksa menerima kekurangan-kekurangan dalam pembinaan projek tersebut walaupun setengah daripadanya mencanggah lukisan dan spesifikasi yang diluluskan. Akhirnya, defenden pertama terpaksa menerima STM, konsultan yang sebelum ini diambil kerja oleh plaintif untuk mengeluarkan Lapuran Kajian Semula Taraf Penyelesaian Kontrak. Maka kebebasan pihak yang dilantik oleh mahkamah juga tidak ada.

[5] Dalam kes *Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Bhd & Anor Appeal*, mahkamah memutuskan bahawa kehadiran tidak bersyarat adalah satu langkah dalam prosiding. Maka, dalam kes ini, oleh

kerana defendan-defendan memasukki satu kehadiran bersyarat dan hanya memohon untuk penggantungan, itu tidak merupakan satu langkah dalam prosiding di bawah s. 6 Akta Timbangtara 1952.

[6] Beban adalah atas plaintif untuk menyakinkan mahkamah bahawa permohonan untuk penggantungan patut ditolak dan plaintif mesti mengemukakan sebab-sebab yang kuat. Walaupun defenden-defenden memenuhi syarat-syarat bagi penggantungan di bawah s. 6 Akta Timbangtara, ini tidak bermakna bahawa mereka secara *ipso facto* berhak untuk penggantungan kerana mahkamah masih mempunyai budi bicara untuk menolaknya. Lazimnya pendekatan mahkamah adalah apabila pihak-pihak berkontrak untuk menimbangtara pertikaian mereka, kontrak itu harus ditepati.

[7] Proses timbangtara adalah lebih cepat kerana hanya satu isu di hadapan penimbangtara iaitu sama ada CPC harus dikeluarkan berdasarkan taraf penyelesaian projek tersebut. Tetapi prosiding mahkamah termasuk permohonan-permohonan interlokutori dan proses rayuan selalunya mengambil masa yang panjang, maka pembinaan bangunan tersebut akan dilambatkan. Walaupun hakim yang arif telah menetapkan tarikh yang awal bagi perbicaraan, ini tidak akan memberikan apa-apa perbezaan. Tiada alasan baik kenapa plaintif tidak menepati perjanjiannya di bawah kontrak untuk menyelesaikan pertikaian melalui timbangtara sedangkan laporan peniliaian taraf penyelesaian yang disediakan oleh STM memihak kepada plaintif.

[7a] Soalan keluaran CPC bersifat teknikal. Seorang penimbangtara dengan pengetahuan dan pengalaman yang luas dalam pembinaan pembangunan lebih sesuai menyelesaikan soalan tersebut. Adalah tidak adil jika defenden-defenden dicegah daripada menyelesaikan pertikaian mereka melalui timbangtara dan terpaksa pula menentukan hak-hak mereka melalui litigasi sedangkan mereka tidak bersetuju menyelesaikannya melalui cara tersebut. Lagi, tidak ada bantahan terhadap tindakan dan timbangtara berjalan bersama. Apabila soalan sama ada CPC patut dikeluarkan ditentukan oleh penimbangtara, keperluan tindakan mahkamah akan berkurang. Oleh kerana hakim yang arif membenarkan permohonan untuk penggantungan atas alasan-alasan yang tidak betul, maka plaintif tidak boleh dikatakan mengemukakan alasan-alasan yang kuat untuk menolak penggantungan.

Rayuan dibenarkan.]

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***

Evans v. Bartlam [1937] AC 473 ***(refd)***

Hashim Majid v. Param Cumaraswamy & Ors [1993] 2 MLJ 20 ***(refd)***

Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Bhd & Another Appeal [1999] 2 CLJ 843 ***(foll)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 ***(refd)***

Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 ***(refd)***

Lloyd v. Wright [1983] 3 All ER 969 ***(refd)***

New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 MLJ 185 ***(refd)***

Northern Regional Health Authority v. Derek Crouch Construction Co Ltd [1984] 2 All ER 175 ***(refd)***

PP Persera Sdn Bhd v. Bimacom Property & Development Sdn Bhd [1999] 6 CLJ 275 ***(refd)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***

Tubeworkers Ltd v. Tilbury Construction Ltd 30 BLR 67 ***(refd)***

Usahabina v. Anuar Yahya [1998] 2 CLJ Supp 131 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)

For the appellant - YM Raja Aziz Addrus (Philip Choong); M/s Philip Choong & Co

For the respondent - Roy Sreenivasan; M/s Cheang & Arif

[Appeal from High Court, Kuala Lumpur; Suit No: S5-22-408-2000]

Reported by Usha Thiagarajah

JUDGMENT

Mohd Noor Ahmad JCA:

The case is related to the construction of commercial and apartment complex on lot numbers 151, 152 and 157, section 87A, Jalan Tun Razak Kuala Lumpur known as the "Marinara" building (the building). The proceedings in the High Court are concerned with two enclosures. Enclosure (8) is in respect of injunctions and encl. (16) is in connection with a stay pending reference to arbitration. On encl. (16), the learned judge dismissed with cost the defendants' application for stay of the writ action filed by the plaintiff and all the other proceedings therein pending reference to arbitration. With regard to encl. (8) the learned judge granted the injunctions sought for by the plaintiff with costs and made certain orders relating thereto.

Briefly, by the injunctions and the orders the 3rd defendant, its employees or agents were restrained from entering the project site without any written consent of the plaintiff and that the 3rd defendant, its employees or agents were required to vacate the project site (prayer (a)), and that the 1st and 2nd defendants were restrained from proceeding with their conspiracy to injure the plaintiff's rights and interests in the project and to prevent the plaintiff from completing the project, including the issuance of any notice of termination in pursuance of the conspiracy (prayer (b)). Further, a professional consultant's company by the name of Messrs Symonds Travers Morgan (Malaysia) Sdn. Bhd. (STM) was appointed by the court to proceed to the project site and inspect and examine the works that have been completed by the plaintiff and report its findings to the court in regard to the completion of the works. In the event STM was of the view that the construction of the building had reached practical completion, the 2nd defendant was ordered to issue the certificate of practical completion (the CPC) immediately and failing which a certificate signed by the senior assistant registrar shall for all purposes be accepted as the CPC. And further, the plaintiff was ordered to carry out the works relating to the major shortcomings as listed in the relevant documents and to complete the works on or before 30 June 2001 and thereafter to report such completion to the court on 30 June 2001 at 11am by submitting a report, to be signed by a qualified architect recognized by the Pertubuhan Akitek Malaysia.

The defendants appealed. We allowed the appeal with costs here and below, and set aside the injunctions and the orders, and granted a stay of the writ action and the relevant proceedings therein pending arbitration. We reserved the issue of cost payable to STM for the work done pursuant to the order of the learned judge, if any and if not amicably resolved. We now give our reasons.

To summarize the facts of the case, under a contract made between the 1st defendant and the plaintiff on 16 March 1995, the plaintiff was employed to construct the building. It was a lump sum contract in the value of RM110 million. The payment was guaranteed by an irrevocable bank guarantee issued by Bank Bumiputra Malaysia Bhd. in favour of the plaintiff. The bank guarantee has the value of RM122.77 million inclusive of the financing cost in the sum of RM12.77 million. The payment would be made upon the issuance of the CPC by the 2nd defendant, the architect of the building. The plaintiff was given possession of the site on 16 March 1995 and the date for completion stipulated by the contract was 15 September 1997. The plaintiff failed to meet the target date for completion and subsequently the date for completion was extended from time to time, the last of which was March 2000.

In between the extended periods, the 2nd defendant issued several notices in writing to the plaintiff under cl. 25 of the Conditions of Contract requiring the plaintiff to proceed regularly and diligently with the works, failing which the 1st defendant might exercise its right to determine the plaintiff's employment under the contract. On 22 March 2000, the 2nd defendant certified a sum of RM102,428,245.83 to be the estimated value of the works done. However, the 2nd defendant refused to certify the progress claim number 58 in the sum of RM111,381,898.70 submitted by the plaintiff on 10 May 2000. The 1st defendant alleged that at the end of the last date for completion there was continuing default on the part of the plaintiff. As such an internal meeting was held by the 1st defendant on 16 May 2000 to consider on terminating the contract and to explore how and when it could be done. On 22 May 2000, the plaintiff wrote to the 2nd defendant requesting for the CPC to be issued as the status of all the major items had been completed. On 29 May 2000, one Bob Giles, a former project architect of the 2nd defendant who was no longer an authorized architect under the laws of Malaysia inspected the works and put up a report to the 1st defendant with a copy extended to the plaintiff listing out 9 items as examples of the worst failures on the part of the plaintiff to meet the specification. On the same day, one Dato' Baharuddin for and on behalf of the 2nd defendant wrote a letter to the 1st defendant in terms which were substantially identical to that of Bob Giles' with a copy extended to the plaintiff. On 30 May 2000, the consulting engineer put up a report to the 2nd defendant listing out the defects in respect of the mechanical and electrical works in the building with a copy extended to the 1st defendant. On 1 June 2000, the 2nd defendant issued another written notice to the plaintiff pursuant to cl. 25 of the Conditions of Contract listing out 7 items of major shortcomings based on Bob Giles' and the consulting engineers's reports. After the issuance of the said notice the plaintiff proceeded regularly and diligently to remedy the shortcomings which were capable of being remedied. The 1st and 2nd defendants were not satisfied with the remedial works done by the plaintiff. In the meantime the plaintiff kept on pressing the 2nd defendant to issue the CPC. On 14 June 2000, the 3rd defendant under the purported authority of the 1st defendant entered the site with uniform guards, some of whom were armed with shotguns. However, the 3rd defendant vacated the site upon being served with an *ex parte* injunction order issued by the High Court on 19 June 2000. At the date of hearing of the enclosures in the High Court, the contract had not been terminated.

The plaintiff took the stand that, notwithstanding the major shortcomings, the works in respect of the building had been practically completed. However, the 2nd defendant refused to issue the CPC. As such, the plaintiff was not able to claim payment under the bank guarantee. Therefore, the writ action based

on trespass and conspiracy to injure the legitimate rights and interests of the plaintiff under the contract was filed and the injunctions sought. On the other hand, the defendants asserted that due to the major shortcomings the plaintiff was not entitled to be issued with the CPC. As the conditions of contract provided for arbitration on any dispute arising under the contract the defendants applied for stay of the writ action and other proceedings therein. Clearly, the issues involved in the writ action are trespass, conspiracy and the issuance of the CPC.

We are fully aware that the decisions of the learned judge on the two enclosures were made in the exercise of his discretion. It is settled law that an appeal will not be entertained from an order which it was within the discretion of the judge to make unless it be shown that he exercised his discretion under a mistake of law (see *Evans v. Bartlam* [1937] AC 473) or where discretion is given to a judge the appellate court ought not to review his decision unless he has declined to exercise his discretion or has manifestly proceeded on a wrong ground (see *New Zealand Insurance Co. Ltd. v. Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185 at p. 200E)

Re Enclosure (8)

The learned judge was right on the statement of the law relating to the basic principles on the granting of an interlocutory injunction including a mandatory injunction. He referred to the classic case of *American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 All ER 504 and correctly stated the basic principles in these terms:

(1) that there is a serious question to be tried;

(2) that in the event that the applicant were to succeed at the trial damages would not be an adequate compensation for his loss;

(3) that the balance of convenience lies in the applicant's favour; and

(4) that there are special circumstances in favour of the applicant or in favour of the respondent.

In his deliberation he also took into consideration the law as phrased by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John v. Mohd. Noor bin Abdullah & Ors* [1995] 1 CLJ 293 at p. 305 which is as follows:

> A judge hearing an application for an interlocutory injunction should:
>
> (1) ask him whether the totality of the facts presented before him disclosed a *bona fide* serious issue to be tried. He must refrain from making any determination on the merits of the claim or any defence to it and identify with precision the issues raised and decide whether they are serious

enough to merit a trial. If he finds that no serious question is disclosed, the relief should be refused. If, however, he finds that there are serious question to be tried, he should move on to the next step of his inquiry;

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by its grant, against the harm that would result from its refusal; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to maintain the *status quo*. It is a judicial discretion capable of correction on appeal. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

We agree with the learned judge that the totality of the facts presented had disclosed a *bona fide* serious issue to be tried. However, it appears the learned judge agreed with the submission of Mr. Chua Eng Siong, the counsel for the plaintiff that the plaintiff would suffer an irreparable injury that could not be adequately compensated by damages if the injunction was not granted. To this we do not agree. We are of the view that the learned judge had misapplied the law to the facts of this case. In this case without any doubt whatsoever that the damages the plaintiff will suffer are monetary. Even if the defendants will not be in a financial position to pay the damages the means to compensate the plaintiff will always be there in the form of the bank guarantee. The bank guarantee is irrevocable and claim on it can be made upon production by the plaintiff to the bank of the CPC within the 14 days following the date of its issue. Being an irrevocable guarantee there is no way the bank can escape from liability to pay under it until the CPC has been issued and a claim made on it within 14 days after its issuance. This is so even if the contract is terminated by the 1st defendant unless it is subsequently adjudicated that the termination is lawful. In fact, on record without taking into account the amount of the retention sum held by the bank the amount under the bank guarantee then was in excess of the value of works done and the claim submitted by the plaintiff to the 2nd defendant for certification. It will not be difficult to assess the amount of work completed as the estimated value of the works done had been certified by the 2nd defendant and that the plaintiff had submitted to the 2nd defendant the progress claim number 58 in respect of subsequent works for verification. Therefore, we are satisfied that if the plaintiff succeeds at the trial it will be adequately compensated by an award of damages for the loss it will suffer as a result of the defendants continuing to do what is sought to be restrained between the time of the application and the time of

the trial. Hence, the application for the injunctions should have been refused, no matter how strong the plaintiff's claim appeared to be at that stage (see *American Cyanamid Co. v. Ethicon Ltd., supra*). The relevant matters under the balance of convenience must be considered step by step. First, the learned judge must be satisfied that the plaintiff would suffer an irreparable injury or that the plaintiff could not be adequately compensated in damages before proceeding to consider other relevant matters on the balance of convenience. This step is in consonance with what was said by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John v. Mohd. Noor bin Abdullah & Ors, supra* in para. (2) cited above, couched in the phrase 'He must take into account all relevant matters, including practical realities of the case before him ...'. It must be so since *American Cyanamid v. Ethicon Ltd., supra* is the *locus classicus* on the subject, and the learned judge in that case was not making new law but adopting the basic principles. The second step is if damages would not provide an adequate remedy for the plaintiff in the event of it succeeding at the trial, the learned judge should then consider whether that if the defendants were to succeed at the trial in establishing their rights to do that which was sought to be restrained, they would be adequately compensated under the plaintiff's undertaking as to damages to the loss they would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction. The third step is if there was doubt as to the adequacy of the respective remedies in damages available to either party or to both then only the judge should proceed to consider the question of balance of convenience. And the last step is where other factors appeared to be evenly balanced the question of the preservation of the *status quo* would then come into play. The learned judge did not follow these steps at all but considered them all together. Therefore, in our view, with due respect, he was wrong. As that first step had not been crossed, we need not touch on the other matters relating to the balance of convenience and the measures calculated to preserve the *status quo* as elaborated by the learned judge. To make it clearer perhaps it is apt to quote what was said by Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd. & Ors., supra, viz:*

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was

its great object, *viz* abstaining from expressing any opinion upon the merits of the case until the hearing' (*Wakefield v. Duke of Buccleuch* [1865] 22 LT 628 at 629). So unless the material available to the court at the hearing of the application for an interlocutory fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at the stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the *status quo*.

To paint a scene from the situation created by the dispute between the parties, on one hand there is the plaintiff which wants to be paid immediately for the works done at its own cost as it is of the view that the issuance of the CPC is justified and on the other hand, the defendants are resisting the issuance of the CPC by reason of the major shortcomings, thus preventing the plaintiff from making the claim on the bank guarantee. In our view, the learned judge in arriving at the decision he had made was really swayed by three factors, namely, (i) the plaintiff had constructed the building at its own costs, (ii) the

2nd defendant had certified the sum of RM102,428,245.83 to be the estimated value of the works done. This is evident from the frequency of mention of that certified sum in his judgment, at least 10 times and the tone of his statement on that certificate which suggests much reliance on it. To our mind, such reliance is misplaced because under cl. 6.0 of the contract the issuance of the interim statements by 2nd defendant in response to the progress claim previously submitted by the plaintiff which culminated in the issuance of the said certificate is solely for the purpose of the plaintiff's monthly draw down from its financial institution for work done on site and that no payment can be demanded from the 1st defendant based on the interim statements of work done. Though the learned judge mentioned cl. 6.0 in his judgment unfortunately he did not highlight this point, and (iii) the glowing write up of the building in the local newspaper 'SunBiz' of Saturday 3 June 2000, by Laura Lee. In our view, such reliance is also wrong because the write up was merely a publicity in the interest of business efficacy but far from suggesting that the major shortcomings bore no truth.

Another unsatisfactory feature of the decision of the learned judge in granting the injunctions and the making of the orders is the effects of the injunctions and the orders made. Firstly, by the injunctions the 1st defendant was compelled to continue to employ the plaintiff which could not deliver the building on time and in accordance with the approved drawings and specification as evident from the major shortcomings, and which had its own remedy in damages if subsequently the contemplated determination proved to be wrongful. Secondly, by the injunctions the plaintiff was allowed to remain in possession of the site and this might aggravate the existing stalemate which would be of no benefit but losses to both sides and such situation would not be conducive to the economy of the country. Thirdly, by the injunctions the 1st defendant was virtually forced to swallow the patent defects as reflected in the major shortcomings even though some of them were contrary to the approved drawings and specification and some involving leakage and causing damage to the timber flooring. Therefore, the decision is unjust. And, lastly, by the orders the 1st defendant, was compelled to accept STM, the same consultant which was earlier employed by the plaintiff to do the Contract Completion Status Review Report – July 2000, and therefore, the independence of the party appointed by the court was sacrificed.

Therefore, as the learned judge had manifestly proceeded on wrong grounds in the exercise of his discretion to grant the injunctions and in making the orders, we are entitled to interfere.

Re Enclosure (16)

Clause 34(1) of the Conditions of Contract provides the machinery for arbitration in respect of any dispute or difference that arises between the employer or architect on his behalf and the contractor at any time as to any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by the contract to the discretion of the architect or the withholding by the architect of any certificate to which the contractor may claim to be entitled. On this occasion, the withholding of the issuance of the CPC by the architect is in issue. It is manifestly clear that the sole purpose of the plaintiff's action is to prevent the 1st defendant from determining the plaintiff's employment under the contract and to compel the 2nd defendant to issue the CPC to enable the plaintiff to make claim on the bank guarantee when the plaintiff has not completed the works under the contract to the satisfaction of the 2nd defendant. With that in mind and that of our decision on encl. (8) we proceed to consider whether or not the learned judge was right in the exercise of his discretion to refuse a stay of the writ action and all the relevant proceedings therein. The defendants based their application for stay under s. 6 of Arbitration Act 1952 (the Act) which reads:

> 6. If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

We note that the defendants at the time when the proceedings were commenced and still remain ready and willing to do all things necessary to the proper conduct of the arbitration. We are in agreement with the learned judge on his statement of the law relating to stay. It is trite law that the onus is on the plaintiff to satisfy the court that it is proper to refuse the application for stay and strong grounds for refusing a stay must be exhibited by the plaintiff. If the defendants can satisfy the court that the conditions for the grant of a stay under the section are satisfied, it does not *ipso facto* follow that they are entitled, as of right, to a stay, for the court still retains a discretion to refuse it. But, generally, the approach of the court will be that parties who make a contract to arbitrate their disputes, should be held to their bargain (see *Seloga Jaya Sdn. Bhd. v. Pembenaan Keng Ting (Sabah) Sdn. Bhd.* [1994] 2

CLJ 716 and the authorities cited therein). In *Lee Brothers Construction Co. v. Teh Teng Seng Realty Sdn. Bhd.* [1988] 1 MLJ 459 it was held that in exercising its discretion, it is the *prima facie* duty of the court to act upon such an arbitration agreement.

The learned judge was satisfied that the plaintiff had given sufficient reasons as to why the differences between the parties should not be referred to arbitration and he refused stay based on the grounds which are summarised as follows:

(1) The construction of the building is saddled by squabbles between the parties. An arbitration would not solve their problems and it would certainly be a prolonged exercise.

(2) It would be best that all the issues before the court, that is to say, the issues of conspiracy, trespass, the issuance of the CPC and the termination of contract be heard together by the court since it has the jurisdiction to hear the dispute.

(3) Presumably, by entering the conditional appearance coupled with the filing of the application for stay the defendants had been regarded as having taken other steps in the proceedings and therefore, was detrimental to them. We so presume because the learned judge merely referred to four authorities which, one way says that the entry of unconditional appearance amounted to taking steps in the proceedings within the meaning of s. 6 of the Act and the other way says that the entry of unconditional appearance does not or the filing of a conditional appearance coupled with an application for stay as well as a prayer to strike out the plaintiff's suit under O. 18 r. 19(1) of the Rules of the High Court 1980 amounted to taking steps in the proceedings. The learned judge did not make a clear-cut finding as to which authority he followed. The four authorities are *Usahabina v. Anuar bin Yahya* [1998] 2 CLJ Supp 131, *Interscope Versicherung Sdn. Bhd. v. Sime Axa Assurance Bhd. & Anor Appeal* [1999] 2 CLJ 843, *PP Persera Sdn. Bhd. v. Bimacom Property & Development Sdn. Bhd.* [1999] 6 CLJ 275 and *Hashim bin Majid v. Param Cumaraswamy & Ors* [1993] 2 MLJ 20. As we do not have the benefit of a written judgment of the Federal Court in *Sime Axa Assurance Berhad & Anor Appeal v. Interscope Versicherung Sdn. Bhd.* we are in a predicament as to which authority to follow. The learned judge was also in the same situation. Therefore, going by the hierarchy we are inclined to follow the decision in *Interscope Versicherung Sdn. Bhd. v. Sime Axa Assurance Bhd. & Anor Appeal, supra* where the Court of Appeal held that the entry of an unconditional appearance constituted the taking of a

step in the proceedings. Hence, in the case before us since the defendants had entered a conditional appearance and merely applied for stay, we are of the view that it did not amount to the taking of a step in the proceedings within the meaning of the section of the Act.

With regard to ground (1), we do not agree with the learned judge. Arbitration process will be more expeditious and since the sole issue that will be before the arbitrator in the context of the dispute is whether the CPC should be issued based on the completion status their problem can be solved faster. On the contrary, as the court proceedings including interlocutory applications and the process of appeals are usually protracted the completion of the construction of the building will be prolonged. The fact that the learned judge had given an early date for trial does not make much difference. We cannot see any good reason as to why the plaintiff declined to honour its bargain under the Conditions of Contract to settle the dispute by arbitration when the two reports on the assessment of the completion status prepared by STM are in its favour.

In respect of ground (2), the learned judge was wrong. No doubt that all the issues are before the court and the court has the jurisdiction to hear the dispute. However, we are of the view that as the question of the issuance of the CPC is technical in nature it is apt that the dispute be settled by arbitration and an independent arbitrator with vast knowledge and experience in the construction industry especially in the building construction will be more ideal for the purpose. Whereas in the court proceedings usually the judge will have to depend on the opinion of an expert in that field and if he accepts the expert evidence he will have to make his own findings based on the evidence. This process does not involve a direct transmission of the knowledge and experience for arriving at the decision as compared to arbitration where the decision of the arbitrator is without any doubt whatsoever based on the direct transmission of his knowledge and experience in that area. Further, the court has no power to open up and review the exercise of the architect's discretion since the court's jurisdiction is limited to determining and enforcing the contractual rights of the parties and does not extend to substituting its own discretion merely because it would have reached a different conclusion since to do so would interfere with the agreement of the parties. Whereas the arbitrator, in the exercise of his power given by the contract, is entitled to modify the parties' contractual rights by substituting his own discretion for that of the architect if the arbitrator disagrees with the architect's certificates, opinions and decisions, (see *Northern Regional Health Authority v. Derek Crouch Construction Co. Ltd.* [1984] 2 All ER 175 CA, *Tubeworkers Ltd. v. Tilbury Construction Ltd* 30 BLR 67 (2 April 1985)). In this case such power is given under cl. 34(2) of the Conditions of Contract. Therefore, it follows that it would be unjust if the defendants were to be prevented from going to

arbitration and were forced to have their rights determined by litigation to which they had never agreed under a jurisdiction which would probably be more limited than that of the arbitrator. And further, there is no inherent objection to an action and an arbitration proceeding side by side (see *Lloyd v. Wright* [1983] 3 All ER 969]. That being the case, the issues of conspiracy and trespass and those issues that had arisen from the disputes or differences under the contract can be adjudicated upon by different tribunals, that is to say, the former by the court and the latter by an arbitrator. After all the disputes between the parties leading to court action were triggered by the withholding of the issuance of the CPC by the 2nd defendant. To our mind, once the question on the issuance of the CPC is decided by the arbitrator, one way or the other, the urgency in the court action will be reduced.

Therefore, as the learned judge had manifestly proceeded on wrong grounds in refusing the stay he could not have been and ought not to have been satisfied that the plaintiff had exhibited strong grounds for refusing a stay. Hence, we have to interfere.